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CLERK

IN THE

Supreme Court of the United States

TERM, 1936

No. [redacted] 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON AND W. R. DUNKUM,
Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MINITREE JONES FULTON
and HERMAN W. WALSH,
Counsel for Petitioners.

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L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, F. S. WINSTON AND W. R. DUNKUM, Petitioners,

versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your above named petitioners pray for a writ of certiorari to the Circuit Court of Appeals of the United States for the Fourth Circuit to review its final judgment in this case, entered on January 7, 1936 (R. 79). A transcript of the record of the case, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with Rule 38 of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case was instituted on May 12, 1934, by a notice of motion filed in the United States District Court for the Eastern District of Virginia, sitting at Richmond, by W. B. Gilmer, Receiver for the First National Bank of Louisa, Virginia, Respondent, to recover $22,000.00 with interest from January 22, 1934, against your petitioners and Charles S. Perkins, W. Worth Smith, Jr., P. B. Porter, Hunter W. Porter, Administrator of B. W. Porter, deceased, J. F. Bickers, Sheriff Administrator of U. M. Gentry, deceased, and J. P. Donnaly in his own right and as Trustee for all of the above named petitioners, as an assessment alleged to have been made by the Comptroller of the Currency of the United States on 230 shares of the capital stock of the insolvent First National Bank of Louisa, Virginia, of the par value of $100.00 a share, alleged to have been purchased by them after having formed a special combination of themselves to buy said stock for profit, as alleged adventurers and owners thereof, and alleging that they weer jointly and severally liable for such assessment on said stock registered on the books of the bank in the name of J. P. Donnaly as Trustee for L. P. Chisholm and others. The judgment was asked against the nine living defendants and the two administrators of the above named decedents (R. 2-3).

PLEAS IN ABATEMENT AND MOTION TO DISMISS AND DEMURRERS

Petitioners, residents, and citizens of the District and of Virginia, on May 28, 1934, filed their several pleas of abatement and motions to dismiss the notice of motion for judgment on the grounds that it was void and of no effect and that no such action could be maintained in the United States District Court by a notice of motion merely signed and issued by respondent and not under the seal of the Court, nor signed by the clerk, and not bearing the teste of the District Judge (R. 5-10), and that the District Court was without jurisdiction to entertain such proceedings.

The District Court overruled these and sustained this mode of instituting the suit in the United States District Court. Exception was taken to this ruling and assigned as error (R. 26).

Demurrers to this notice of motion were then interposed by petitioners and the notice of motion was amended and the demurrers were then again filed to the amended notice of motion (R. 15), and were overruled and petitioners excepted and assigned error (R. 14-15, 26-28).

PLEAS OF BANKRUPTCY

Pleas in bankruptcy were then filed by J. P. Donnaly, P. B. and H. W. Porter, C. L. Perkins, and W. Worth Smith, Jr. (R. 22-23).

PLEAS OF GENERAL ISSUE

Petitioners plead the general issue and filed grounds of defense, U. M. Gentry's Administrator, relying on insanity of his intestate (R. 4, 15-19).

The grounds of defense were: (1) Petitioners denied that they had purchased or subscribed, either individually or jointly, for the 230 shares of capital stock of the Bank of Louisa; (2) denied that they had entered into any special *combination* for the purpose of buying said shares of stock for profit; (3) admitted that each of them had purchased for himself one-eleventh part of the 230 shares of the capital stock of the Bank and stated that the interest of each of them therein *was to that extent only;* (4) each of the petitioners denied that he was a joint owner thereof and denied that each of them was liable for the payment of the whole amount of the assessment alleged to have been made on the 230 shares of stock (R. 18-19).

PROCEEDINGS AT TRIAL

At the trial, on April 25, 1935, U. M. Gentry's Administrator moved that the case be continued as to him by reason of his having filed a plea of insanity on the part of his decedent at the time of the alleged transaction. Petitioners objected to this continuance on the ground that the alleged suit was *joint* against eleven defendants, and only a joint judgment could be entered binding upon all. This motion was overruled and an exception was noted and assigned as error (R. 31-32).

Upon the trial petitioners objected to the admission of certain evidence and exceptions were noted and assigned error (R. 23-33, 34, 39-41, 44, 46).

At the conclusion of respondent's evidence, petitioners moved for a directed verdict in their favor on the grounds that the evidence showed that each of them had purchased and were owners individually of only one-eleventh interest in the 230 shares of stock and that it had not been shown that they had formed a special combination or a *joint* adventure or partnership for profit or that each was jointly liable

for this payment of the whole of this alleged assessment on the 230 shares. This motion was overruled and exception noted and assigned as error (R. 46).

Petitioners then introduced their evidence and at the conclusion of all the evidence again moved for a directed verdict in their favor on the same grounds, which was overruled and exception noted and assigned as error (R. 57-63).

Respondent who had also *previously* moved for a directed verdict and had then withdrawn it until after the Court had announced it would overrule petitioners' motions, then again moved for a directed verdict in his favor, which motion was granted and exception was noted and assigned as error (R. 58-63).

The jury thereupon rendered the following verdict:

"We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, 1934, until paid" (R. 23, 63).

Petitioners thereupon moved to set aside the verdict of the jury and grant a new trial on grounds specifically stated, which motion was overruled and the Court entered judgment on the verdict, and exception was noted and assigned as error (R. 22-26, 63).

ASSIGNMENTS OF ERROR

Petitioners thereupon filed their assignments of error (R. 26-28) and filed their bills of exception within the time

prescribed by law (R. 28, 64).

An appeal was thereupon allowed to the Circuit Court of Appeals of the United States for the Fourth Circuit which, on January 6, 1936, after hearing it, affirmed the judgment of the District Court with costs (R. 79).

QUESTIONS INVOLVED AND PRESENTED IN THIS PETITION ARE:

I

The Circuit Court of Appeals for the Fourth Circuit in overruling petitioners' pleas in abatement and motion to dismiss the notice of motion for judgment and in affirming the judgment of the District Court and dismissing the appeal has erred and rendered a decision which has misconstrued and misapplied the Revised Statutes of the United States, Section 911 (Title 28 USCA Section 721), on the ground that the notice of motion was a *process* and was not under the seal of the Court, nor signed by the clerk, and did not bear teste of the District Judge, and that it was without jurisdiction to entertain such proceedings, and that the United States Marshal was likewise without authority to serve said notice of motion under Section 911 of the Revised Statute (Title 28 USCA, Section 721), and that the District Court and the Circuit Court of Appeals never acquired jurisdiction at all over petitioners by a valid service of a valid process. In such a case there was an entire want of jurisdiction and the judgment of the Circuit Court of Appeals for the Fourth Circuit was erroneous, and in conflict with the decisions of the Circuit Courts of Appeal of other Circuits and of this Court, and has thus created a conflict in the decisions on this important matter of federal law which should be settled by this Court.

II

The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment for $22,000.00 of the District Court only against the five petitioners jointly, on a notice of motion alleging that the liability for the payment of this assessment was *joint* as to all of the eleven defendants and then continuing this action as to one of the defendants, U. M. Gentry's Administrator, and thereby discontinued this action as to him, and that the Circuit Court of Appeals has thus decided an important question of substantive federal law in a way probably untenable and in conflict with the weight of authority and with the applicable decisions of this Court.

III

The Circuit Court of Appeals for the Fourth Circuit has erred in rendering a decision affirming the judgment of the District Court in holding that the liability of petitioners for the payment of the alleged assessment made by the Comptroller of the Currency upon the 230 shares of stock of the insolvent National Bank of Louisa, Virginia, was "contractual," and each of the petitioners were jointly liable for the payment of the whole of the $22,000.00, the amount of the assessment, and that it was *not an individual statutory liability* only to the extent each had invested in the 230 shares under Title 12, USCA Section 63 and 64, and has thus misconstrued this federal statute, and erroneously decided an important question of federal law, and has construed and applied it in a way probably in conflict with the statute and the applicable decisions of the other Circuit Courts of Appeal ~~and of this Court~~, and that this important federal question which has not been, but should be decided and settled by this Court.

IV

The Circuit Court of Appeals for the Fourth Circuit has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, in affirming the judgment of the District Court for $22,000.00 against your petitioners and refusing to grant petitioners' motion for a directed verdict in their favor made first at the end of respondent's evidence (R. 46), and again at the end of *all* of the evidence (R. 57), and in doing so has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, under which statute the shareholders of the National Bank Associations are made *"individually"* responsible, *and not one for another and only to the extent of the amount invested by each in the stock thereof*, at the par value thereof, in addition to the *amount* invested in such shares by each of them "individually"; and has erred in holding that each of your petitioners was "jointly" liable for the payment of the whole amount of the alleged assessment, ten times more than the amount "invested individually" by each of them in such shares, and in *later* directing a verdict (R. 23, 62) for respondent on his motion which was not made until *after* the District Court had announced that it would overrule petitioners' motions for a directed verdict (R. 58), and in holding that the evidence on respondent's motion for a directed verdict was so far undisputed or of such a character as would have made it the duty of the District Court, as a matter of law, to direct a verdict for respondent. The decision of the Circuit Court of Appeals has thus misconstrued and misapplied this federal statute and the evidence and has misinterpreted both and has decided an important question of federal law in a way that is untenable and in conflict with the evidence and the weight of authority and of the applicable decisions of other Circuit Courts of Appeal and of this Court, and has so far departed from the accepted and usual course of

judicial proceedings, or so far sanctioned such a departure in a lower Court as to call for the exercise of this Court's power of supervision.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

(1) The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment and decisions of the District Court and in overruling petitioners' pleas in abatement and motions to dismiss respondent's motion for judgment on the ground of want of jurisdiction under Title 28, USCA, Section 721, in that the notice of motion for judgment was a *process* of the District Court, and was not under the seal of the Court, signed by the clerk, and did not bear the teste of the District Judge, as was provided it should by that Statute, and has thus rendered a decision in conflict with the Statute and the applicable decisions of this Court.

(2) The Circuit Court of Appeals for the Fourth Circuit has erred and misconstrued and misapplied the Federal Statute, Title 12, Sections 63 and 64, in holding that the liability of your petitioners as shareholders was for the payment of the whole amount of the assessment alleged to have been made by the Comptroller of the Currency on the 230 shares of stock of the insolvent National Bank of Louisa, Virginia, and was "contractual" and "joint" and was not *statutory*, and was not imposed by virtue of the above statute and was not limited to the amount *individually invested by each of your petitioners* in such shares, or solely "to the *extent of the amount of his stock therein*, at the par value thereof, in addition to the amount *invested* in such shares" by each of them, but made each liable one for the other, and in this case for *ten times more than each petitioner had invested in such*

shares (R. 35, 36, 37, 38, 39, 42, 46, 47, 48-49, 50, 51, 54, 55). This important question of construction of the Federal Statute thus raised should be settled by this Court.

(3) The Circuit Court of Appeals for the Fourth Circuit in its construction of Title 12, USCA, Sections 63 and 64, has rendered a decision in conflict with the Statute and the applicable decisions of this Court by resorting to the expedient fo holding that "which each (of defendants) had one-eleventh interest in the enterprise" (Opinion, R. 74), yet the liability of the five petitioners was nevertheless *joint* for the payment of the whole assessment on the 220 shares of stock of the alleged insolvent First National Bank of Louisa, Virginia, and was not one of "*individual* liability" limited to the "*extent of his investment in the shares, at par value*, in addition to the amount *invested* in such stock" by each of your petitioners as a shareholder, but that each of them was liable for the whole, "one for another"; namely, for ten times more than the amount each of them had "invested in such shares; namely, one-eleventh interest *only*, which the Circuit Court of Appeals for the Fourth Circuit found each defendant had (R. 74).

(4) Because the Circuit Court of Appeals has decided an important question of statutory federal law in a way probably untenable and in conflict with the weight of authority, and contrary to the statute itself.

(5) Because he Circuit Court of Appeals has erred in not reversing the decision of the District Court and in holding that while the liability for the payment of the double assessment was *joint*, yet that U. M. Gentry's Administrator, one of the defendants, was nevertheless not a neecssary party, and in discontinuing the action as to him, and entering a joint

judgment against your five petitioners for the whole amount of the double assessment of $22,000.00 made on the entire 220 shares. This question was not one of mere procedure, but involved a consideration of the *liability* on which respondent had declared, the evidence as to the amount each of the petitioners had invested in the shares, and the construction of Title 12, USCA, Sections 63 and 64.

(6) The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment of the District Court finding and holding that while each of your petitioners "had only a one-eleventh interest in the enterprise" (R. 74), *i. e.*, the 220 shares of stock on which the assessment was made, yet that each of them was nevertheless liable for the payment of the whole assessment on the entire 220 shares. It has thus decided the question of your petitioners' liability for the payment of such assessment in a way which is untenable, contrary to the overwhelming weight of the evidence, contrary to the weight of authority, and in conflict with the applicable decisions of this Court, and has misconstrued and misapplied Title 12, USCA, Sections 63 and 64, which expressly limit the individual liability of each of the petitioners for the payment of the assessment to the *extent* only of his investment in the shares of such bank, and not for ten more than each had invested in the shares. For these reasons the decision and judgment of the Circuit Court of Appeals calls for the exercise by this Court of its power of supervision.

(7) Because the Circuit Court of Appeals has erred in affirming the judgment of the District Court and in holding that while "it is clear that each had a one-eleventh interest in the enterprise" (R. 74), yet the liability of your petitioners for payment of the entire assessment made on the whole 220 shares was nevertheless joint, and that each was liable for

the entire amount thereof; and in so doing it has misconstrued Title 12, USCA, Sections 63 and 64, and has likewise misunderstood and misapplied the evidence, and failed to give effect to it, and disregarded the fact that the District Court during the trial held that each merely had an undivided one-eleventh interest in the entire block (R. 61) of the 220 shares, and that the subscription for the shares was "one agreement" and the making of the joint promissory note to the American Bank and Trust Company to borrow the money for each to pay for his stock was "another agreement" (R. 34). The Circuit Court of Appeals has thus erroneously disregarded the evidence and refused to follow this specific finding of fact made by the District Court, and has misconstrued and misapplied the Federal Statutes, Title 12, USCA, Sections 63 and 64, in its application to the evidence and has erroneously directed a verdict for respondent contrary to the law and evidence. These questions thus raised by the decision of the Circuit Court of Appeals call for the exercise of this Court's power of supervision.

Wherefore, your Petitioners respectfully pray that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the United States for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. ....., L. P. Chisholm, Waller Holladay, W. Earl Crank, T. S. Winston, and W. R. Dunkum, Petitioners, *versus* W. B. Gilmer, Receiver for the First National Bank of Louisa, Louisa, Virginia, Respondent, and that the final judgment of the Circuit Court of Appeals herein complained of may be reviewed and reversed by this Honorable Court, and that your petitioners

may have such other and further relief in the premises as to this Honorable Court may say meet and just; and your petitioners will ever pray.

Respectfully submitted this March ...., 1936.

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARL CRANK,
T. S. WINSTON,
W. R. DUNKUM.

MINITREE JONES FULTON and
HERMAN W. WALSH,
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versus

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is not yet reported in Federal Reporter but is set out in the record at pages 71 to 79. The opinion of the District Court is not reported but is set out in the record at pages 57 to 62.

JURISDICTION

(1) The final judgment of the Circuit Court of Appeals sought to be reviewed was entered on January 7, 1936 (R. 79), and affirmed the judgment of the District Court of July 2, 1935, for $22,000.00 against petitioners (R. 25-26).

(2) The suit was attempted to be instituted in the United States District Court by a notice of motion for judgment issued by respondent and signed by him. It was not under the seal of the Court, nor signed by the clerk, and did not bear the teste of the District Judge as required by the Federal Statute. It was issued solely by the Receiver of the alleged insolvent First National Bank of Louisa, Virginia, against petitioners as alleged shareholders therein to recover an assessment alleged to have been made by the Comptroller of the Currency on the shares of stock of said insolvent bank under and by virtue of authority of Federal Statute, Title 12, USCA, Sections 63 and 64, and involved an amount of more than $3,000.00 exclusive of interest and costs (R. 1-2).

(3) The jurisdiction of this Court is invoked under Section 240 of the Act of February 13, 1925, as amended. (Title 28, USCA, Section 347-A, Judicial Code 240.)

Some of the cases believed to sustain the jurisdiction are:

McLane v. *Rankin,* 197 U: S. 154, 49 Law, Ed. 702.
Pauley v. *State & Company,* 165 U. S. 606, 41 Law, Ed.

844.

Rankin v. *Fidelity & Company*, 189 U. S. 242, 47 Law, Ed. 792, Revised Statutes Section 51 U. S., Title 12, USCA 62, 63 and 64.

Earley v. *Richardson*, 280 U. S. 496, 50 S. Ct. 176, 74 Law, Ed. 575, 69 L. R. A. 658.

Ohio, etc., Bank v. *Hewlett*, 254 U. S., 51 Law, Ed. 423.

STATEMENT OF THE CASE

The facts and a full statement of the case in so far as this application is concerned have been given in the Petition for the Writ to which reference is here made, as to the subject matter of the suit, the issues presented in the notice of motion and pleadings, the judicial question presented, and the decision and final judgment of the Circuit Court of Appeals (R. 71-79). In the interest of brevity the statement is not repeated at this point.

SPECIFICATION OF ERRORS

The errors which petitioners will urge are that the Circuit Court of Appeals for the Fourth Circuit erred:

(1) In overruling petitioners' pleas in abatement, motions to dismiss the notice of motion and judgment and demurrers thereto and in affirming the judgment of the District Court and dismissing the appeal, has misconstrued and misapplied Title 28, USCA, Section 721, because under that statute a suit to recover money must be begun by a writ or process, and the notice of motion for judgment was a process within the meaning of that statute and was not under the seal of the Court, nor signed by the clerk, and did not bear teste of the District Judge, and the District Court was

without jurisdiction to entertain such proceeding, and the United States Marshal was likewise without authority to serve said notice of motion under the Federal Statute, Title 28, USCA, Section 50[illegible]. There was no valid service of a valid process on petitioners, and the judgment of the District Court was void for want of jurisdiction, and the decision of the Circuit Court of Appeals has thus misconstrued the above federal statutes and is in conflict with the decisions of other Circuit Courts of Appeal and has created a conflict in such decisions on this important substantive matter of federal law which should be settled by this Court.

(2) In proceeding to trial and judgment against the five petitioners and each of them (R. 26) for $22,000.00, the entire amount of the double assessment on the 220 shares of stock, without the presence of the Administrator of U. M. Gentry, one of the defendants who was alleged to be *jointly* liable with petitioners in the notice of motion for the payment of the double assessment, and in not trying the case as to him along with the petitioners. This was in effect a discontinuance of the joint action as to him (R. 1-2), while holding that he and "each had a one-eleventh interest in the block" (R. 74), yet nevertheless the plaintiff had the right to proceed to judgment for the whole amount against petitioner a part of the defendants solely liable for the subscription under Section 6025 of the Code of Virginia 1900, without proceeding against the other joint defendants (R. 72-73). The Circuit Court of Appeals has thus erroneously decided under a statute not applicable an important question of substantive federal law in a way probably untenable and in conflict with the Federal Statutes and Title 12, Sections 63 and 64, and the weight of authority and the applicable decisions of this Court and of the other United States Circuit Courts of Appeal. The question was not one of mere procedure un-

der or controlled by Section 6047 of the Virginia Statute relating to when a joint or several judgments may be instituted in the United States Court, but was one where Congress had legislated the above Title 28, Section 721, and of federal substantive law, Title 12, USCA, Sections 63 and 64, which expressly provides:

> "The shareholders of every National Banking Association *shall* be held *individually* responsible, equally and ratably, and not one for another, but each to the amount of his stock therein at par value in addition to the amount invested in such stock."

Neither a joint or several judgments could be entered against the five petitioners under this Federal statute for a greater amount than "one-eleventh interest' which both the District Court (R. 61) and the Circuit Court of Appeals (R. 74) found that Gentry's Administrator and each of the other deefndants had in the 220 shares of stock registered and held by J. P. Donally, Trustee for L. P. Chisholm and others.

(3) In admitting evidence, over the objection of petitioners, as to the execution by them along with the other six defendants of a note for $36,450.00 given to the American Bank and Trust Company to borrow money for each to pay his one-eleventh part of the purchase price each had agreed to invest and as to the judgment thereon by the Receiver of said Bank, and in admitting any evidence relating thereto, as specifically pointed out in Assignments of Error numbered (4), (5), (6), (7), (8) and (9), set out in the Record at pages 27 and 28.

(4) In rendering a decision affirming the judgment of the District Court holding that the *liability* of petitioners for the payment of the whole amount of the alleged assess-

ment upon the 220 shares of stock of the insolvent National Bank of Louisa, Virginia, was "joint" and "contractual," (Op. R. 72) and that such liability was not statutory under Title 12 USCA, Sections 63 and 64, and was *not* limited to the "*extent* of the amount invested" by each of petitioners as shareholders therein

(5) The Circuit Court of Appeals for the Fourth Circuit has also misconstrued and misapplied Title 12, USCA, Sections 63 and 64, under which petitioners as shareholders of the First National Bank of Louisa were made *individually* and severally responsible *only* to the extent of the amount each invested in the shares of stock agreed to be bought by them, and in holding that "while each had a one-eleventh interest in the enterprise" (Op. R. 74) that each of the petitioners was nevertheless *jointly liable* for the payment of the *whole* amount of the alleged assessment on the entire 220 shares of stock. Such finding was contrary to the uncontradicted evidence, to the several agreements of purchase, and was in violation of and misconstrued and misapplied the above sections of the Federal statute, which made each of them individually liable for the assessment only to the "extent each had invested in such shares." The construction of this important Federal question should be reviewed and finally settled by this Court.

(6) In overruling petitioners' motion made at the conclusion of the plaintiff's evidence for a directed verdict in their favor, and in likewise overruling petitioners' same motion renewed at the conclusion of all the evidence to direct a verdict in their favor (R. 57) and in not holding that a judgment could only be entered against each of them for the assessment on the one-eleventh of the 220 shares which both the District and the Circuit Courts of Appeals found (Op. 61, 74) each owned or had in the 220 shares of such National Bank stock both under their contracts of subscription and

under Title 12, USCA, Sections 63 and 64, and yet nevertheless erroneously held that each of the five petitioners were jointly and severally liable for the payment of the whole amount of the double assessment made on the entire 220 shares. This joint liability was not proved and was not a fact.

(7) In sustaining the respondent's motions to direct a verdict in his favor made *after* the Court had announced that it would overrule petitioners' motions for a directed verdict (R. 58) and in refusing to submit the case to the jury under proper instructions on the law and evidence in respect to what their respective agreements to purchase was and as to the amount each invested in the shares of stock, and as to the extent of their ownership of each in the 220 shares, and as to the alleged liability of each of the petitioners as to the payment of the whole or only one-eleventh of the assessment made on the 220 shares of stock made by the Comptroller of the Currency and deciding such liability contrary to both the evidence and law. (R. 35, 36, 37, 38, 39, 42, 46, 47, 48, 50, 51, 54, 55).

(8) In overruling petitioners' motion to set aside the verdict and award a new trial to petitioners and in holding that "while each of petitioners had only a one-eleventh interest in the entire enterprise" (R. 74), yet as a matter of law each of the five petitioners was nevertheless liable for the payment of the *whole assessment of* $22,000.00 made on the entire 220 shares of the stock of such bank. Such holding was contrary to the statute, Title 12, USCA, Sections 63 and 64, and to the evidence.

ARGUMENT

I

The Federal Courts have repeatedly held that a notice

of motion issued an dsigned solely by a plaintiff for the purpose of instituting an action at law in a District Court of the United States, *was a process* within the meaning of Revised Statutes of the United States, Section 911 (Title 28, USCA, Section 721), and to be valid it had to be under the seal of the District Court, signed by the clerk, and bear the teste of the District Judge.

The action in the instant case was begun by a notice of motion for a personal judgment for money. It was *not* under the seal of the District Court, nor signed by the clerk, and did not bear teste of the District Judge. (R. 1-2). The District Court was without jurisdiction to entertain such action under Title 28, USCA, Section 721, and the United States Marshal was likewise without authority to *serve* such notice of motion under Title 28, USCA, Section 503. The District Court never acquired jurisdiction at all of the suit because there was no valid service of a valid process or valid service. The decision of the Circuit Court of Appeals affirming such judgment is erroneous and in disregard and in violation of such statutes and in conflict with the decisions of other Circuit Courts of Appeal and and the weight of authority and has created a conflict in the Federal decisions on this important matter of Federal law, and involves a Federal question under the laws of the United States.

The whole proceeding was contrary to Title 28, USCA, Section 721, which provides:

> "*All writs and processes* issuing from the Courts of the United States shall be under seal of the Court from which they issue, and shall be signed by the clerk thereof."

In Rose's Code, Volumn 1, Section 901, the author states:

"Federal Courts derive their power to issue the common-law writs from *R. S., Section* 911. The *form* and general style of *Federal writs are also prescribed by Congress. So that the conformity requirement of R. S. Section* 914 *has little or no application to Federal writs.* The conformity law applies, however, to process in common-law causes, *except as regards form and style, which Congress has prescribed, and as respects service, it being provided that Federal process shall be served by the marshall.* These requirements as to form and service forbid adoption in the Federal Courts of the New York and Wisconsin practice in so far as it permits plaintiffs' attorney to issue and serve the summons."

The decision of the Circuit Court of Appeals is also in direct conflict with *Peaslee* v. *Haberstro*, Fed. Cas. No. 10, 884, where the Court held:

"*The motion to set aside the summons must be granted upon the ground that the summons was not signed by the clerk or under the seal of the court.* Section 911 of R. S. of U. S. prescribes that '*all writs and processes issuing from the Courts of the United States shall be under seal of the Court from which they issue and shall be signed by teh clerk thereof.*' This provision is not inconsistent with and, therefore, *is not repealed* by the subsequent Act of Congress (Act of June 1, 1872, Section 5, 17 Stat. 197) now embodied in Section 914 of R. S. which enacts that 'the practice, etc. * * *' (Conformity Act). Giving due effect to the latter act, the practice and forms and mode of proceeding in Courts of the United States in common law actions is to conform to and be regulated by that of the State Courts *when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent*, the practice of the State Courts will prevail, *but when those statutes speak they are controlling.* If the *summons* in this case had been

signed by the clerk, it could be amended as regards the seal. *As it is there is no summons in the nature of process known to this Court. The summons is set aside.*"

So for the same reasons the summons issued by and signed by the plaintiff in the instant case should have been set aside.

In *Dwight* v. *Merrit* (Cir. Ct. S. D. N. Y.), 4 Fed. 614, a motion to set aside a *summons* under New York practice, Blatchford, Circuit Judge, said:

> "In this case an *attempt* has been made to *commence a suit at common law in this Court by serving on the defendant a paper purporting to a summons in the form presented by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney*, but is *not under seal of the Court. * * * A summons, or notice to the defendant for the commencement of a suit is certainly process, quite as much as a capias or a subpoena to appear and answer is process. The statute intends that all process shall issue from the Court, where such process is to be held to be the action of the Court, and that the evidence that it issues from the Court* and is the action of the Court *shall be the seal of the Court and the signature of the clerk.* It is *clear that a signature by the plaintiffs' attorney without a seal and an issuing from the office of such attorney cannot be substituted.* There is nothing in the provisions of Section 914 which abrogates the provisions of Section 911. The two must be so construed as to stand together. *Peaslee* v. *Haberstro*, 15 Blatch. 472. The principle of that decision has been generally adopted in applying Section 914 to the practice of the Federal Courts in suits at common law. *That principle is that where Congress has by statute pointed out a specific course of procedure, or has legislated*, generally upon the subject matter embraced or involved by the proceedings sought to be pursued, *such legislation must be followed, although opposed to the forms and*

modes of proceeding prevailing in the state Courts and established by state statutes. Defect not amendable."

In *Johnson* v. *Healy*, Fed. Cas. at page 7389, it was also said:

"In the case of *Martin* v. *Criscuola*, Cas. No. 9159, it was held that a summons not issued by a Court, but merely issued by the plaintiffs' attorney, *was not a proper summons*. That decision, on the view that the summons is process and must, under the statutes of the United States, and notwithstanding the provisions of the Act of 1872 and of Section 914 of R. S., *be issued by the Court* and have the authentication of the Court."

In *U. S.* v. *Martin*, 223 Fed. 805 (E. D. N. Y.), the Court, distinguishing between form of process and manner of service, said:

"*Federal legislation must, of course, be followed, although opposed* to the practice and procedure of the state Courts. U. S. Rev. St. Section 911 (Comp. St. 1913, Section 1534). Accordingly it has been held that an *action may not be commenced in the Federal Courts by a summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the Courts of the State of New York* *Martin* v. *Criscuola*, 10 Blatchf. 211, Fed. Cas. No. 9, 159; *Peaslee* v. *Haberstro*, 15 Blatchf. 472, Fed. Cas. No. 10, 884; *Dwight* v. *Merrit* (C. C.), 4 Fed. 614."

In *Middleton Paper Co.* v. *Rock River Paper Co.*, 19 Fed. 252, it was said:

"Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit, but I believe it has been uniformly held, *in view of the pro-*

*visions of Congress, that this cannot be done in the Federal Courts * * * .*"

In re Condemnation Suits, 234 Fed. 443 (E. D. Tenn.) Sanford, Jude, said:

"I think it *entirely clear,* both upon principle and under the authorities, that in any original suit in a Federal Court which must be commenced by a summons or other process of the Court itself, *such process must be signed by the clerk and issued under seal of the Court* to be valid, *regardless of any different provision* as to the form of a summons *in the state Courts, the general conformity statutes not operating to waive this specific requirement as to the process in the Federal Courts* embodied in Section 911 of the Rev. Statutes. (Citing cases.)"

In *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931, 932, Mr. Justice Miller, delivering the opinion of this Court, distinguished and determined the manner of exercise of different sorts of jurisdiction thus:

"*Jurisdiction of the person is obtained by the service of process,* or by the voluntary appearance of the party in the process of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it."

In *Boswell* v. *Otis,* 9 How. 336, 13 L. Ed. 164, 169, this Court again said:

"*Jurisdiction is acquired in one of two modes:* First, *as against the person of the defendant by the service of process;* or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court."

Jurisdiction was not acquired in either of the two modes in the instant case.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, 570, this Court again distinguished the use of substituted service by notice *in a rem proceeding from process which is required to give jurisdiction against the person.*

In the case at bar the District Court was called upon to exercise a jurisdiction "against the person," and under the above Federal Statute and decisions, jurisdiction could *only* be acquired by a process issued by the District Court, signed by the clerk, and bearing the teste of the Judge. (USCA, Title 28, Section 721). "Lex ita est." Where Congress has specified a procedure it must be followed.

NOTICE OF MOTION IS PROCESS

The Circuit Court of Appeals held that the notice of motion for judgment in the instant case was under the Virginia statute a proper method of proceedure to obtain a personal money judgment against petitioners in the United States District Court. (R. 72).

This holding is indirect conflict with Title 28, USCA, Sections 721 and 508, and with the decisions of other Circuit Courts of Appeal, and the weight of authority pointed out supra. This conflict in the Federal decision should be settled by this Court.

Besides Hughes Fed. Proc. 2nd Ed., Section 137, referring to Title 28, USCA, Section 721, says:

> *"This excludes procedure by motion to recover money common in some states when the notice is simply signed by the attorneys. * * * A motion to recover money*, when authorized by state practice, can be used in the Federal Courts; *but in such case the notice of motion * * * must be signed, not by the attorneys, but by the clerk, and must be under the seal of the Court."*

Hughes in his 6th Edition, Section 3584, again says:

> "In *general the forms* of such process that obtain in the State courts are adopted in the Federal Courts, *except that there can be no departure from the Federal statutory requirement as to the sealing, signing and testes of writs and processes.*"

The notice of motion in the case at bar departed from these Federal statutory requirements, and was not a valid service of a valid process, and the judgment, was void for want of jurisdiction, and the Circuit Court of Appeals for the Fourth Circuit erred in not so holding.

Moreover, the Supreme Court of Appeals of Virginia in *Hot Springs Co.* v. *Schreck*, 131 Va. 581, 584, referring to the proceeding of Notice of Motion in the State Courts said:

> "We have held in a number of cases that the notice under Section 6046, *takes the place of the writ and declaration. Morotock Ins. Co.* v. *Pankey*, 91 Va. 259, 21 S. E. 487; *Security Loan Co.* v. *Fields*, 110 Va. 827, 67 S. E. 342, and cases cited.

This holding by the highest Court of the States as to the notice of motion taking the place of the writ and declaration . . . a process under the Virginia statute—should have been regarded as binding upon the United States District Court and the Circuit Court of Appeals in the instant case, and the notice of motion, is, therefore, clearly within Section 911, R. S., which declares that the exercise of the judicial power of the United States *shall be by a paper signed*, and authenticated by its officers. The decision of the Circuit Court of Appeals for the Fourth Circuit in the instant case, as well as its former decision in *Ely* v. *Gamble*, 75 Fed. (2nd) 171, is erroneous and in conflict with the decisions of other Circuit Courts of Appeal on the same matter and involves a

Federal question, and is untenable, and in conflict with the great weight of authority, and with the U. S. revised statute, Section 911. These important Federal questions should be settled by this Court.

II

Moreover, the only provision in the Federal law for *service* of *process in a "personal action to recover* a money judgment" in the United States Courts is Section 503, Title 28, U. S. Code. It provides:

> "It shall be the duty of the marshal of each district to attend to the District Courts when sitting therein, and to execute, throughout the District, all lawful process *directed to him*, and issued under the authority of the United States. (R. S. Section 787.)"

The United States Marshal, therefore, had no authority to serve the Notice of Motion in the instant case under Section 503, Title 28, USCA, *supra*, and the final judgment and decision of the District Court in the instant case was a nullity and void for entire want of jurisdiction to entertain such action.

III

The Circuit Court of Appeals for the Fourth Circuit has erred in affirming the judgment of the District Court against petitioners, five of the defendants, and in continuing the case as to U. M. Gentry's Administrator, one of the other defendants who had not taken bankruptcy, and who was alleged to have been jointly liable with petitioners for the payment of the entire double assessment on the 220 shares of stock of the insolvent National Bank (Op. R. 72-73).

First, this holding increased the individual responsibility of petitioners as shareholders from one-eleventh to eleventh-elevenths, or ten times more than the amount *invested* in the shares by each of the petitioners; secondly, denied each of them the right of contribution against the alleged joint defendant, Gentry's Administrator; thirdly, if not reversed, this holding will compel petitioners to pay the whole double assessment on the entire block of 220 shares, although the District Court and the Circuit Court of Appeals both found each of them had only one-eleventh part in the entire block of 220 shares. This made each petitioner liable for the other defendants, and not each "individually responsible, equally and ratably," and made petitioners liable for payment of the assessment made on the shares owned by U. M. Gentry's Administrator, as well as on the shares owned by the other six defendants who had taken bankruptcy prior to the trial; fourthly, compelled petitioners to try plaintiff's claim against the alleged joint defendant, Gentry's Administrator, both as to his alleged joint and several liability and as to his claimed insanity, and changed petitioners from defendants to plaintiffs.

This was erroneous and contrary to the individual liability imposed on petitioners by virtue of Title 12, USCA, Sections 63 and 64, and was not one of mere procedure under the Virginia Code of 1930, Sections 6047 and 6225, as was erroneously held by the Circuit Court of Appeals. (Op. R. 72-73), but was one of statutory liability imposed on each by the Federal Statute.

The District Court (R. 61) found from the evidence that each of the defendants merely had "an undivided one-eleventh interest in the entire block which was kept in the block under the control of the trustee for certain purposes," and the Circuit Court of Appeals likewise found, (R. 74), ". . . . it is clear that while each had one-eleventh interest in the inter-

price, * * * yet it nevertheless erroneously held, that the liability for payment of the double assessment was for the whole amount of the entire 220 shares, and not for one-eleventh of it.

This materially changed the substance of the alleged case, as to which the parties directed their proof, and misconstrued and misapplied, and nullified Sections 63 and 64, Title 12, USCA.

The Circuit Court of Appeals (Op. R. 72) cited the cases of *Richmond* v. *Irons*, 121 U. S. 27, 55; *Mattesson* v. *Dent*, 176 U. S. 521, 525 as authority for its holding in the instant case. Those cases do not sustain it.

First, because the bill of complainant in *Richmond* v. *Irons* shows that the suit there was "for an account of the amount for *each* of the said defendants upon the number of shares of stock held by them at the time said bank suspended" (30 L. Ed. 867).

No question of joint liability was involved in that case. Moreover, this Court in that case, at page 871, said:

> "By the original National Banking Act, Section 5151 of the Revised Statutes, it was declared that "The shareholders of every national banking association shall be held *individually* responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, *to the extent of the amount of their stock therein*, at the par value thereof, *in addition to the amount invested in such shares.*"
> * * *
> "As all the shareholders are bound in that way * * * any proceding to enforce this liability must be such as from its nature would enable the court to ascertain for

what the stockholders ought to be made liable, to whom, and in what proportion as respects each other."

It is thus obvious that the decision of this Court in *Richmond* v. *Irons* does not sustain or authorize the holding of the Circuit Court of Appeals in the instant case.

Nor does the decision of this Court in *Matteson* v. *Dent* sustain the erroneous holding of the Circuit Court of Appeals, to the effect that the respondent, receiver, might proceed to judgment against the petitioners, five of the defendants, for the whole amount of the assessment made on the block of 220 shares, under and by virtue of Sections 6047 and 6225 of the Code of Virginia, 1930, without proceeding against the other alleged defendants.

In that case the action was by the Receiver of the insolvent National Bank to recover from the allotees of the deceased, Matteson, an assessment on stock owned by him in his life time and registered in his name on the books of the bank at the time of his death. After his death the decedant's estate, including the shares of stock, was turned over, one-third to his widow and one-ninth to each of his children as the allottees of his estate. The National Bank failed and the comptroller made an assessment "upon each share and proceeded to enforce the assessment. The receiver sued in the State Court of Minnesota, the widow and children of Matteson, asking judgment against them for the amount of the said assessment.

This Court held:

"The suit was in conformity to the general Statute of 1894 of Minnesota which . . . permitted an action to be brought against *all* or one or more of the

next of kin of the deceased person, by the creditor of an estate, to recover the distributives shares received out of such estate or so much thereof as might be necessary to satisfy the debt of the intestate." (176 U. S. at 523, 44 L. Ed. 571).

IV

RESPONSIBILITY OF SHAREHOLDERS INDIVIDUAL AND STATUTORY—NOT CONTRACTUAL OR JOINT

The Circuit Court of Appeals (R. 73) next erroneously held:

The Circuit Court of Appeals (R. 73) next erroneously held:

"Coming to the *merits* of the case we note at the conclusion of the testimony both sides moved for a direct verdict." It is well settled that this amounts to a waiver of jury trial and a consent that the Trial Judge decide the issues and direct the verdict accordingly * * *. In other words, the verdict must stand unless the party against whom it was directed was entitled to have it directed in his favor," and cited *Williams* v. *Vreeland*, 250 U. S. 295, and other cases, as sustaining this holding.

These cases do not sustain the holding in the instant case. First, because in the case of *Williams* v. *Vreeland* this Court said:

> "Each side asked for a directed verdict without more."

In that case the motion was made by both sides for a

directed verdict at the same time. In the instant case the motions for a directed verdict were *not* made at the same time (R. 46, 57-58), and there was "more."

Second, petitioners at the conclusion of plaintiffs' evidence first moved for a directed verdict in their favor (R. 46). This motion was overruled (R. 46, 28). The evidence then showed that the petitioners were *not* jointly liable, nor were they individually or jointly responsible for the whole assessment made on the 220 shares of stock. They were, therefore, entitled to have a verdict directed in their favor, since the action was *joint* and the holding of the District and Circuit Court of Appeal was contrary to both the facts and law.

The grounds of petitioner's motion for a directed verdict in their favor first made at the conclusion of respondent's evidence and later renewed at the conclusion of all the evidence, were in effect that the evidence showed that petitioners and other defendants were each owners of only one-eleventh interest as mere tenants in common in the block of 220 shares registered on the books of the bank and held in the name of J. P. Donnally, Trustee for L. P. Chisholm and others, and nothing had been shown to create a liability against petitioners for the whole amount jointly or *individually* for their respective interest in the stock in question, and no special combination or joint adventure or limited partnership for profit had been proven (R. 46).

The allegation of the notice of motion was *joint*, and alleged that the five petitioners and the six other defendants were *jointly* and severally liable for the payment of the whole double assessment made on the entire block of 220 shares of stock of the insolvent national bank registered and

standing on the bank's books in the name of J. P. Donnally, Trustee for L. P. Chisholm and others. The bank books did not disclose the name of any of the defendants or for whom Donnally was trustee except L. P. Chisholm, and did not show or discolse the number of shares owned by each of them or the amount invested by each of them in the stock or the extent of their respective investment therein.

The evidence showed that each petitioner owned only one-eleventh interest in the block of 220 shares held by Donnally, trustee; that each had purchased one-eleventh part thereof and that that was the extent of the investment made by each in such stock when they each agreed to take it (R. 36, 37, 38, 42, 47, 49, 50, 51, 54-55, 58).

There was, therefore, a variance between the respondent's allegations and proof, and Title 12, USCA, Section 64, expressly declared, "That the sharehoulders of every national bank shall be held individually responsible equally and ratably therein * * * in addition to the amount invested in such stock."

And the District Court (R. 61) and the Circuit Court of Appeals (R. 74) both found from the evidence that each of the defendants *only* "had one-eleventh of the block of 220 shares of stock standing in the name and held by Donnally, Trustee."

The action of the Circuit Court of Appeals affirming the ruling of the District Court in overruling petitioners' above motion for a directed verdict in their favor was, therefore, clearly contrary to both the facts and law and was erroneous, since petitioners were entitled to have their respective motions for a directed verdict in their favor granted, both under both the evidence and law.

Thirdly, at the conclusion of all the evidence, petitioners renewed their above motion for a directed verdict in their favor (R. 57), and respondent then likewise moved for a directed verdict in his favor, but being told by the District Court:

"That the effect generally when each side moves for a directed verdict is, it takes the case away from the jury," respondent said:

"I am going to withdraw our motion for the time being and take it up on the charge" (R. 57), and oppose the granting of petitioners' motion for a directed verdict in their favor (R. 58).

Respondents thereby admitted that the evidence was sufficient to carry the case to the jury for its decision, and that it was not to be decided by the trial Court as a matter of law.

Thereupon, petitioners' motion for a directed verdict was argued, and the trial Court (R. top of 58) said:

> "I don't have any doubt about my duty to overrule this motion. The question in my mind is whether I should submit the case to the jury at all or not."

Respondent thereupon said:

> "Our view is that it should not be submitted to the jury."

The Court then said:

> "I haven't heard any motion to that effect."

Respondent then said:

"We make it right now" (R. 68).

It is thus obvious from the record that the trial Court had announced that it overruled petitioners' motion for a directed verdict in their favor *before* respondent made its motion for a directed verdict, and that both sides did not move for a directed verdict at the same time, and that the effect of respondent's motion for a directed verdict in his favor made *after* the trial Court had overruled both of the petitioner's motions for a directed verdict in their favor, *was not to take the case from the jury and make it solely one for the decision of the Court as a matter of law on the evidence in the instant case.*

Fourth, it is likewise obvious from the evidence that the Circuit Court of Appeals erred in affirming the judgment of the District Court in overruling petitioners' motions for a directed verdict, first made at the conclusion of respondent's evidence (R. 46) and later at the conclusion of all the evidence (R. 57).

On this point the records shows that respondent, in whose favor the trial Court directed a verdict was not entitled on the evidence and law in this case to have the trial Court as a matter of law to direct a verdict in his favor, since there was substantial, preponderating and overwhelming evidence in favor of petitioners against whom the verdict was directed.

L. P. Chisholm, one of the defendants, testified:
"We agreed to take one-eleventh of that stock."

Perkins, another of the deefndants, testified (R. 39).

He agreed to try to pay one-eleventh instead of going on the big note, didn't want to go on any of it; was ready and willing to pay his one-eleventh; didn't mind owning one-eleventh at that time. * * *

P. B. Porter testified (R. 46):

Each was to taken one-eleventh part; each was to pay for one-eleventh share at the rate of $150 for each share of stock they took, each was to get 21 or 22 shares or something like that; that was the understanding he had with each of the others.

Id. (R. 47).

Q. What interest did you have in the 220 shares?

A. As I said formerly, sir, my interest was one-eleventh, that is what I considered.

Walter Holladay, another of deefndants, said (R. 49): "* * * each director bought one-eleventh interest.'

Earl Crank testified (R. 51):

" * * * that each agreed to take his eleventh part, one-eleventh of whatever number was unsold at that time."

Worth Smith, another defendant, testified (R. 53):

"* * * he assumed he was buying in accordance with the first meeting, namely, one-eleventh."

W. R. Duncan testified (R. 54):

"* * * when the question of selling the stock came up he proposed to buy one-eleventh as he understood it, *and did buy one-eleventh* of the amount that was issued, 220 shares or something like that that had not been sold to others."

Thomas S. Winston, another defendant, testified (R. 53):

"It was his agreement he was to take one-eleventh of the stock."

J. D. Donnally, Cashier, another defendant who was also Trustee, testified (R. 56):

"He purchased one-eleventh of the block of stock, whatever that might be, 250 shares or less."

None of the other defendants or parties to the agreement to purchase the stock testified, and the Receiver offered no evidence of any other person who was present and made the agreement of each to buy.

Donally, Trustee, further testified (R. 42-43):

"He said he in 1931 and 1932 filed in the Comptroller's Office a report of the stockholders of the bank, etc."

This list showed the shares of stock which each of the defendants had purchased was an undivided one-eleventh interest as shown by the evidence *supra,* and shows that the creditors of the bank as well as the Comptroller of the Currency knew and could have ascertained for whom J. P. Donnally was Trustee and the number of shares held by each, if the creditors and the Comptroller had made due inquiry.

This evidence is not conclusive that each of the petitioners only owned one-eleventh interest in the block of 220 shares, certainly was sufficient to show that respondent was not entitled to have a verdict rendered in his favor and to carry the case to the jury for a decision on this issue.

For on respondent's motion for a directed verdict in his favor the burden was on him to establish by *undisputed* evidence before a verdict could be directed in his favor.

On this point the record also shows that the District Court found that each of the five petitioners and the other six defendants "merely had an undivided one-eleventh interest in the entire block which was kept in a block under the control of a trustee" (R. 61). It also shows that the Circuit Court of Appeals itself found (R. 74) that the:

> "Several defendants took the stand and testified that each was to own one-eleventh of the stock purchased, but it is clear that, while each had a one-eleventh interest in the enterprise, the stock was purchased as a result of the joint action of all; that it was paid for with the profits of a note that they executed jointly; that it was held in trust and for joint use and benefit; that they shared in the losses sustained as a result of the purchase; that the dividends received were applied for their joint benefit; that each had an equal voice in the manageemnt of the enterprise, and that they would have shared equally in the profits, if profits had been realized."

*Here, the important fact is that each of the defendants purchased "and merely had an undivided one-eleventh interest in the entire block," and that it is clear that * * * "each had a one-eleventh interest in the enterprise."*

Title 12, USCA, Sections 63 and 64, made the shareholders "*individually* responsible, equally and ratably," and not one for another, and only "to the extent of the amount each had invested in the block of 220 shares." By this statute each defendant was made *individually* responsible only to the extent of the one-eleventh of his stock or interest in the 220 shares of stock on which the assessment was made.

The mere fact that each bought one-eleventh of the shares at the same time and that this was the result of the joint

action of all, that it was paid for out of the proceeds of a note that was executed jointly to the American National Bank to enable each to raise his part of the cash to pay for his one-eleventh part of the shares, and each shared to the extent of one-eleventh part of any losses sustained, and that the dividends received from the Bank of Louisa on the shares of stock purchased by each of them were directed to be applied by the trustees to pay the interest on the note given by them to the American National Bank, and that each had an equal voice in the handling of the stock purchased by them from the Bank of Louisa, and shared equally in the profits, if any had been realized, *did not either as a matter of law or fact render each of the petitioners and other defendants responsible for the whole double assessment made on the entire block of 220 shares of stock, nor did it make each of them liable beyond the amount each invested in the block of stock, no matter how it was held or handled by the trustee for purposes of convenience of the several shareholders, as alleged in the notice of motion.*

The *fundamental fact is* that each agreed to purchase one-eleventh and to invest to that extent only in the entire shares to be issued by the bank, as the Courts seek to ascertain "for what each stockholder ought to be liable, to whom, and in what proportion as respects each other" (*Richmond* v. *Irons*, 30 L. Ed. 871).

This was the construction placed by this Court on this statute in *Pauly* v. *State Loan and Trust Company*, 165 U. S. 606, 17 S. Ct. 465, 41 L. Ed. 844, where, construing the above statute, it reviewed the earlier cases relating to the responsibility of the shareholders for a double assessment made on the shares of stock of an insolvnt national bank (R. 17 U. S. Ct.), said:

> "The *real* owner of the shares of capital stock of the National Bank Association is treated as the shareholder in the meaning of 5151 (Title 12, USCA, Section 63)."

In the recent case of *Early* v. *Richardson,* U. S. 496 at 499, 50 S. C. 176 at 177, 74 L. Ed. 575, 69 A. L. R. 658, this Court also said:

> "That the *actual* owner of the stock may be held for the assessment, although his name does not appear upon the transfer books of the bank, is well settled. *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, 168, 27 S. Ct. 179, 51 L. Ed. 423; *Davis* v. *Stevens,* 17 Blatchf. 259, 7 Fed. Cas. 177, 178 (No. 3,653); *Case* v. *Small,* 10 F. 722, 724; *Houghton* v. *Hubbell,* 91 F. 453."

"Assent is necessary to become liable for a double assessment in a national bank," said this Court in *Keyser* v. *Hitz. Early* v. *Richardson,* 50 S. Ct. 177, and *Keyser* v. *Hitz,* 133 U. S. 138, 10 S.Ct.290 ,33L.Ed.531.

The Circuit Court of Appeals predicated its decision holding petitioners jointly and severally responsible for the whole double assessment, solely upon the state procedual statutes, sections 6047 and 6225, and upon the ground that the responsibility was *contractual.*

This holding is in direct conflict with Title 12, USCA, Sections 63 and 64, and the decision of this Court in *Christopher* v. *Norvell, Receiver of the First National Bank of Florida,* 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732 at 734, where this court said:

> "* * * and that a receiver of a national bank may, if necessary, to pay the debts of such an association enforce the individual liability of the stockholders." (Citing the Federal Statute.)

And at page 735 the Court further said:

> "In the event *she* became, by *force of the statute, individually responsible* to the amount of her stock at the par value thereof * * * Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women."

And at page 736 said:

In *McClaine* v. *Rankin*, 197 U. S. 154, 161-163, 49 L. Ed. 702, 705-707, 26 Sup. Ct. Rep. 410, 412, 413, which was an action against a shareholder of a national bank to recover the amount due on an assessment made by the Comptroller of the Currency, *and in which the question was as to the nature of the cause of action,* this Court said:

> "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. *If* 5151 *had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of* 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but *merely imposes a liability* on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and *statutory*. * * * But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action *to enforce the statutory liability, and not an action for breach of contract.*"

This Court thus held that Title 12, USCA, Sections 62-63, *created* the liability and made the shareholders *"individually responsible"* equally and ratably, and not one for another * * * to the extent of his stock therein.

To hold that the State laws could change the Federal Statutory liability from one imposed by the statute to a contractual liability and could change it from an individual to a joint liability, would be to allow the State law to defeat the policy of Congress expressly declared by Title 28, USCA, Sections 63 and 64, and by which the substantive rights of all shareholders and their individual responsibility is created and established by that act. *Laurent* v. *Anderson,* 70 Federal (2nd), 819 at 823.

The Circuit Court of Appeals in making its decision resorted to the expedient of holding "that although each of the petitioners only purchased and had one-eleventh of the block of 220 shares "and caused them to be held in the name of Donnally, Trustee, yet that nevertheless they were engaged in a joint enterprise" and that their responsibility was contractual (Op. R. 76). This holding was not only contrary to the Federal Statute which created the *individual* statutory liability, and to the decisions of this Court construing the same, but is obviously based upon a misapprehension of the facts and a misconstruction of the Federal Statute, and is entirely erroneous.

The fact that the directors of the bank as officers thereof, voted to increase the capital stock of the bank to the extent of 250 shares and then offered the stock to the old stockholders under their right to buy it, *did not create any joint* responsibility, or a joint adventure or a partnership on the part of petitioners in the purchase by each of a one-eleventh of the stock not taken by its existing stockholders, or sold to the public.

In voting to increase the capital stock the directors of this

bank acted just as all boards of directors of national banks act in similar circumstances. This did not create a partnership or joint adventure on the part of the petitioners and the other defendants.

Nor did the agreement of each of the defendants to purchase one-eleventh of the entire block of stock left after having first offered it for sale to the existing stockholders of the bank. Nor did the fact that each of them agreed that the one-eleventh purchased by him should be placed in the hands of a trustee and subsequently sold, or that each agreed to borrow the money to pay for his respective interest and to give a note to another bank from which they borrowed it. None of these extraneous acts changed the "individual responsibility" of each equally and ratably, and not one for another * * *, or the amount invested by each in his shares, did not change his *statutory "individual responsibility"* for any assessment thereafter made on the shares purchased by each *to a joint liability for the whole assessment made on the entire block of 220 shares held by J. P. Donnally, Trustee.* Both the District and Circuit Courts having found from the evidence that each of the petitioners and defendants had a one-eleventh interest in the entire block of 220 shares, the assessment subsequently made by the Comptroller of the Currency attached *only to the one-eleventh of the shares owned by each. This conclusion is inescapable.*

The fact that the purchase was or was not made as a means of strengthening the bank, in which all of the directors were interested, did not create a joint adventure or partnership.

V

The Circuit Court of Appeals next said (R. 77-78):

"And we think the same result follows if the relation-

ship of the defendants as joint adventures be ignored. Unquestionably they made a joint subscription for the stock through their trustee; and if the suit were on this joint subscription there would be no question as to the joint liability for the right subscription price," and cites Williston and certain cases from state courts.

These authorities did not involve the question of *individual responsibility* under the Federal Statute relating to the double assessments on the shares of insolvent national banks, Title 72, USCA, Sections 63 and 64, and have no applicability to the instant case.

This holding of the Circuit Court of Appeals is also contrary to the facts and the finding of the District Court (R. 61) where it found that each shareholder "merely had an undivided one-eleventh interest in the entire block which was kept in a block under the control of a trustee for certain purposes, all of which enured for the benefit of all." It was also contrary to the findings by the Circuit Court of Appeals (R. 74) that: "Several of the defendants took the stand and testified that each was to own one-eleventh of the stock purchased; but it is clear, that while *each had a one-eleventh interest in the enterprise*, the stock was purchased as the result of the joint action of all, etc."

It is submitted, in the light of the above findings from the evidence in the instant case, that the conclusion of the Circuit Court of Appeals that, "Unquestionably they (Petitioners) made a joint subscription for the stock through their trustee," is erroneous and in conflict with both the evidence and the Federal Statute, since each agreed for himself to take or purchase one-eleventh of the block of stock and to place his stock in the hands of J. P. Donnally, Trustee, for the "mere purposes of more conveniently handling it to

enable each to borrow the money to pay for it," etc. (R. 35, 39, 46, 49, 51, 53, 54, 56). No joint subscription of the stock was ever made by petitioners or any of defendants "through the Trustee, J. P. Donnally." He never subscribed for any of them, and no such claim was made in the trial Court or the Circuit Court of Appeals by respondent.

It is therefore submitted that the subscription was *not joint* and the responsibility for the double assessment *was purely statutory* and was imposed by the Comptroller of the Currency upon the shares of stock purchased and owned individually by each of petitioners and other defendants; and that the responsibility was not *"contractual,"* as was erroneously held by the Circuit Court of Appeals, but was an "individual responsibility, equally and ratably, and not one for another, * * * to the extent of the amount invested by each of the shareholders in his stock."

In *Pauly* v. *State*, 165 U. S. 606, 41 L. Ed. 844 at 850, this Court said:

> "And let it be observed that the liability upon shareholders is to the extent of the amount of their stock at the par value thereof in addition to the amount invested in such shares. The word '*invested*' plainly has reference to those who originally or by subsequent purchase became the real owners of the stock and cannot refer to those who never invested money in the shares, but only received the certificates of stock or, it may be, legal title thereto as collateral security for debts or obligations already or to be contracted. * * * If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that upon any principle of justice or upon grounds of public policy, the pledgee could have been held to the liability imposed by U.S.R.S. 5151 upon shareholders. But the *liability being purely statutory*, the result ought not to be different

because of the circumstance that the name of the pledgor was omitted from the certificate," etc. * * *

It therefore follows that mere ownership does *not* involve in and of itself responsibility for the double assessment made on shares of stock under and by virtue of the terms of the statute, Title 12, USCA, Sections 63 and 64. To the contrary, each interest is distinct and separate. Each shareholder, whether the shares of stock are held in his own name or that of a trustee, is an aliquot owner and is responsible as the actual beneficial owner for the assessment made on the shares only in respect and to the extent of *his* interest, that is only on the number of shares owned individually by him. But he is not responsible for assessment on the shares owned by others, whether the entire stock be held by a trustee or otherwise.

It is submitted that the writ of Certiorari should be granted.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,

Dated March 14, 1936.

APPENDIX

Code of 1930 Virginia, Sections 6047 and 6225, are set out in the printed record at page 72.

The pertinent parts of Sections 63 and 64 are as follows:

63. INDIVIDUAL LIABILITY OF SHAREHOLDERS. — The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *

64. INDIVIDUAL LIABILITY OF SHAREHOLDERS; TRANSFER OF SHARES.—The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagement of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock.